In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-742

FIRST NATIONAL BANK AT LUBBOCK, Trustee,
ESTATE OF VERA B. HARRELL, Deceased, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 463 F. 2d 716. No opinion was written by the district court.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1972, and a petition for rehearing was denied on August 31, 1972. (Pet. App. A11-A13.) The petition for a writ of certiorari was filed on November 20, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals was correct in holding that there was insufficient evidence to overcome the statutory presumption that substantial gifts to decedent's adult daughter, her only child, made within four months of decedent's death from leukemia, were transfers in contemplation of death within Section 2035 of the Internal Revenue Code of 1954, and that the government's motion for judgment notwithstanding the verdict for petitioner should have been granted.

STATUTE AND REGULATIONS INVOLVED

Section 2035 of the Internal Revenue Code of 1954 and the pertinent provisions of Section 20.2035-1 of the Treasury Regulations on Estate Tax (1954 Code) are set forth in the Appendix, *infra*, pp. 11-12.

STATEMENT

This is an action to recover estate taxes in the amount of $24,866.48 assessed and paid when the Commissioner of Internal Revenue determined that gifts aggregating $95,457.47 made by decedent within four months of her death on April 1, 1964, were transfers in contemplation of death within Section 2035 of the Internal Revenue Code of 1954, and therefore includible in decedent's gross estate. (R. 4, 5-7.[1]) The case was tried to a jury which answered special interrogatories in favor of the petitioner. The district court entered judgment on the jury's verdict. The court of appeals held that the government's motion for judgment notwithstanding the

[1] "R." references are to the record appendix filed in the court of appeals.

verdict should have been granted, since there was insufficient evidence to take the case to the jury, and ordered judgment for the United States. (Pet. App. A9-A10.)

In November, 1963, the decedent, Mrs. Vera Harrell, was a sixty-one-year-old widow who had been a school teacher for over thirty years. She lived in Lubbock, Texas, with her daughter, an only child, Lamoyane, who was unmarried, thirty-three years old, and also a teacher. (Pet. App. A2.)

In that month, decedent visited the office of her attorney to discuss the preparation of a will. The attorney prepared a list of property that Mrs. Harrell owned, and made an estimate of the value of the listed property. The estimate came to $468,750, and the attorney made a rough calculation that federal estate taxes and state inheritance taxes on an estate of that size would come to $128,500. Mrs. Harrell expressed shock at the size of her estate, and the resulting taxes. The attorney explained to her that she could reduce the size of her estate and the tax liability by making gifts of some of her property. (Pet. App. A2.)

In the following month, December, 1963, decedent made the first of the four gifts here in question to her daughter, Lamoyane. She transferred to her four church bonds of the value of $2,000. On January 6, 1964, a $6,081.84 account in a savings and loan association, previously jointly owned, was placed solely in Lamoyane's name. On January 27, 1964, a $2,375.63 account in the Lubbock Teachers Federal Credit Union, held in the names of decedent and her daughter, was transferred into Lamoyane's name alone. The attorney

who had made the list of Mrs. Harrell's property noted these transfers, and the fourth, made in February, on that list. (Pet. App. A2, A3, A7.)

Early in February, 1964, Mrs. Harrell visited Dr. Douglas, a specialist in internal medicine in Lubbock, concerning an apparent skin disorder. No specific findings were made by the physician, but an abnormal blood count was discovered. On February 10, a further examination was made, and hospital tests were ordered to investigate a blood disorder. Mrs. Harrell was admitted to the hospital on February 11, 1964, for tests, including a bone marrow study. Dr. Douglas wrote in his physical examination history, "Undiagnosed hematological disease. Suspect aleukemic leukemia." (Pet. App. A3.)

On the same day that she was admitted to the hospital, decedent made the fourth gift to her daughter—2,000[2] shares of Combined Insurance Company stock with a value of $85,000. (Pet. App. A3.)

While she was still in the hospital undergoing tests, on February 19, 1964, decedent executed her will. She left her home, automobile, and household goods to her daughter outright. The remainder of her estate she left in trust to pay the income to her daughter for life, with remainder to her daughter's surviving issue, if any. On February 20, 1964, Mrs. Harrell was discharged from the hospital, with the physician's report of that date suggesting a condition of aplastic anemia, but with leukemia not ruled out. Forty-eight hours later, she

[2] The figure "8,000" appearing at Pet. App. A3 is an error. All references in the pre-trial order, in exhibits, in testimony, and in the charge to the jury were to a transfer of 2,000 shares.

was readmitted to the hospital with a high fever. Dr. Douglas sought the advice of certain Dallas doctors, and Mrs. Harrell was transferred to a Dallas hospital early in March. Leukemia was firmly diagnosed in that month, and decedent died on April 1, 1964. (Pet. App. A3-A4.)

Dr. Douglas testified that he had never specifically told Mrs. Harrell that she had the fatal disease of leukemia, but he did tell her that he had been looking for a serious disease and thus had ordered three bone marrow studies. He informed her of this some time before the transfer to Dallas. (Pet. App. A4.)

Testimony offered by the petitioner on trial related to Mrs. Harrell's cheerfulness and optimism during the period in question, to her love for her daughter, her church activity, and to the fact that during the period after her husband's death in 1956, she had made some gifts to her daughter.[3] (Pet. App. A6.)

The trial judge submitted to the jury four special interrogatories, each relating to one of the gifts made by decedent to her daughter after November, 1963, and asking whether that gift had been made in contemplation of death. The jury gave a negative answer to each interrogatory. (Pet. App. A2.)

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[3] In 1958, decedent gave her daughter a $125 wristwatch and a $500 piano (as a graduation present). In 1959, decedent gave her $3,000 cash. In 1961, Lamoyane purchased a radio-stereo and an automobile, toward which decedent paid a total of $2,980.50. In 1962, decedent gave Lamoyane a ring valued at $661.82 as a Christmas gift. In 1963, shortly prior to the conference with her attorney, decedent had given Lamoyane a chair ($119.95) and $600 cash. (R. 38-39.)

ARGUMENT

The decision below is correct. There is no conflict of decisions; no question of general importance is involved, and there is no other apparent reason for review by this Court.

Section 2035 of the Internal Revenue Code of 1954, Appendix, *infra*, p. 11, in pertinent part provides:

> (a) *General Rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer * * * in contemplation of death.
>
> (b) *Application of General Rule.*—If the decedent within a period of 3 years ending with the date of his death * * * transferred an interest in property, * * * such transfer * * * shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section * * *; but no such transfer * * * made before such 3-year period shall be treated as having been made in contemplation of death.

The long-standing Treasury Regulations, Section 20.2035-1(c), Appendix, *infra*. p. 12, provide in pertinent part:

> * * * A transfer "in contemplation of death" is a disposition of property prompted by the thought of death (although it need not be solely so prompted). A transfer is prompted by the thought of death if (1) made with a purpose of avoiding death taxes, (2) made as a substitute for a testa-

> mentary disposition of the property, or (3) made for any other reason associated with death. * * *

This Court long ago established in *United States* v. *Wells*, 283 U.S. 102, 116-117, that "The dominant purpose [of the predecessor of Section 2035] is to reach substitutes for testamentary dispositions and thus to prevent the evasion of estate tax."

Quite apart from the statutory requirement that a taxpayer must show the contrary if any transfer made within three years of death is not to be deemed made in contemplation of death, the transfers in this case clearly came within both of the first two criteria established by the Regulations, *supra*. The transfers followed hard upon the decedent's expression of shock at the prospective amount of estate taxes, and after her attorney's suggestion that her estate, and the resulting taxes, could be diminished by gifts. The fact that the attorney thereafter made notations of the transfers upon the list of the decedent's property that he had prepared in conference with her established that these were not unrelated events. Transfers thus clearly made to avoid the estate tax are transfers in contemplation of death, as provided by the Regulations. *Allen* v. *Trust Co. of Georgia*, 326 U.S. 630; *Vanderlip* v. *Commissioner*, 155 F. 2d 152 (C.A. 2), certiorari denied, 329 U.S. 728.

The transfers in question were also substitutes for a testamentary disposition. They were made after consultation upon the preparation of decedent's will, and within a short time before the execution of that will. They were made to the natural object of decedent's bounty, her daughter and only child, with whom she

lived, and the sole immediate beneficiary under decedent's will. Such circumstances establish that the transfers were a substitute for a testamentary disposition, and therefore in contemplation of death. *Burns* v. *Commissioner,* 177 F. 2d 739 (C.A. 5); *Davidson's Estate* v. *Commissioner,* 158 F. 2d 239 (C.A. 10); *Oliver* v. *Bell,* 103 F. 2d 760 (C.A. 3); *Purvin* v. *Commissioner,* 96 F. 2d 929 (C.A. 7), certiorari denied, 305 U.S. 626; *Estate of Honickman* v. *Commissioner,* 58 T.C. 132.

None of the evidence presented by petitioner was inconsistent with the statutory presumption and the facts indicating that the transfers were in contemplation of death. Evidence of the decedent's love for her daughter supported, rather than rebutted, the indications that the transfers were substitutes for testamentary disposition. The evidence of prior gifts was of relatively small and sporadic gifts, made principally upon sentimental occasions or for personal use, or both—not to be compared with gifts of cash and securities amounting to approximately one fifth of decedent's estate. None of the other elements of petitioner's evidence—discussion of income tax consequences of the transfers, cheerfulness, optimism, church work—is inconsistent with, or overcomes the patent elements of, avoidance of estate taxes and testamentary substitutes that marked decedent's transfers.

In order to recover, the petitioner was required by Section 2035(b) to show by the preponderance of evidence that transfers within four months of decedent's death were not in contemplation of death. *First Trust & Deposit Co.* v. *Shaughnessy,* 134 F. 2d 940 (C.A. 2),

certiorari denied, 320 U.S. 744; *Landorf* v. *United States*, 408 F. 2d 461, 472 (Ct. Cl.). In the absence of such a preponderance of evidence, the district court should direct a verdict for the government, or grant a motion for judgment notwithstanding the verdict. *First Trust & Deposit Co.* v. *Shaughnessy, supra.* The court of appeals was therefore correct in holding that the testimony offered by the petitioner was insufficient to take the case to the jury, and in ordering judgment for the United States notwithstanding the verdict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2035. TRANSACTIONS IN CONTEMPLATION OF DEATH.

(a) [as amended by Sec. 18(a)(2)(C), Revenue Act of 1962, P.L. 87-834, 76 Stat. 1052] *General Rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(b) *Application of General Rule.*—If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

§ 20.20351-1 *Transactions in contemplation of death.*

* * * * *

(c) *Definition.* The phrase "in contemplation of death", as used in this section, does not have reference to that general expectation of death such as all persons entertain. On the other hand, its meaning is not restricted to an apprehension that death is imminent or near. A transfer "in contemplation of death" is a disposition of property prompted by the thought of death (although it need not be solely so prompted). A transfer is prompted by the thought of death if (1) made with the purpose of avoiding death taxes, (2) made as a substitute for a testamentary disposition of the property, or (3) made for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized in order to determine whether or not such thought prompted the disposition.

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